



OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS  
JOHN CORNYN

July 5, 1999

Ms. Joni M. Vollman  
Assistant General Counsel  
Harris County District Attorney  
201 Fannin, Suite 200  
Houston, Texas 77002-1901

OR99-1859

Dear Ms. Vollman:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 125442.

The Harris County District Attorney (the "district attorney") received a request for "any and all documents in the possession of the Harris County District Attorney's office," concerning a specified individual and cause number. In response to the request, you submit to this office for review a representative sample of the information at issue.<sup>1</sup> You indicate that you will release some of the requested information to the requestor. You argue, however, that the remaining requested information, submitted as Exhibits A through E, is excepted from disclosure by sections 552.101 and 552.108 of the Government Code.

You first argue that the information in Exhibit A is excepted from disclosure by section 552.108. Section 552.108 of the Government Code provides in part:

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

\* \* \*

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation;

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

\* \* \*

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why section 552.108 is applicable. *See* Gov't Code §§ 552.108, .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You explain that the documents in Exhibit A constitute the prosecutor's work product. The information you seek to withhold in Exhibit A consists of "the work product of the prosecutors for the Harris County District Attorney's Office, including handwritten and typed notes of prosecutors and their investigators, [and] the cover folders of the prosecutor's files." After examining Exhibit A, it appears that the information you seek to withhold was prepared by an attorney representing the state in criminal litigation or by an individual working at the direction of such an attorney. Therefore, the information you seek to withhold in Exhibit A is protected from disclosure under section 552.108(a)(3)(A).<sup>2</sup>

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<sup>2</sup>We note that, pursuant to section 552.108(c), the district attorney may not withhold "basic information" about the offense from the requestor. *See* Gov't Code § 552.108(c) (section 552.108 does not except from disclosure basic information about arrested person, arrest, or crime). We assume for purposes of this ruling, however, that such information was contained within the documents you have previously released to the requestor.

You assert that the material in Exhibit B must be withheld under section 552.101. Section 552.101 of the Government Code excepts from disclosure “information deemed confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, any CHRI in your possession that falls within the ambit of these state and federal regulations must be withheld.

You contend that Exhibit C is a medical record. The release of medical records is governed by section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the “MPA”), which provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient’s behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Exhibit C may be released only in accordance with these provisions of the MPA. Open Records Decision No. 598 (1991).

You next contend that Exhibit D may be withheld pursuant to section 552.101 of the Government Code. Specifically, you seek to withhold an offense report narrative, excluding the front page, and witness' written statements detailing the alleged sexual assault pursuant to common-law privacy. Section 552.101 protects information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

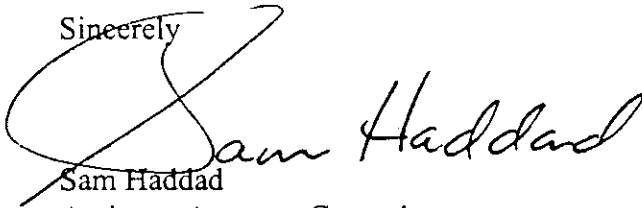
Clearly, information pertaining to an incident of sexual assault raises an issue of common-law privacy. Open Records Decision No. 339 (1982). In Open Records Decision No. 339 (1982), this office concluded that "a detailed description of an incident of aggravated sexual abuse raises an issue of common law privacy" and, therefore, any information tending to identify the assault victim should be withheld pursuant to common-law privacy. *See also* Open Records Decision No. 393 (1983).

We have marked a representative sample of the information in Exhibit D that implicates the privacy interests of the rape victim. It is not clear to this office, however, whether this information has been revealed in open court or in public court records. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (information contained in public court records not protected by common-law privacy). *See also Star Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474-475 (Tex. 1995). Consequently, the district attorney must withhold the types of information we have marked only to the extent that the information has not otherwise become public.

Finally, we consider whether Exhibit E, consisting of polygraph examination results, must be withheld. Section 552.101 encompasses information protected by other statutes. Texas law prohibits the public disclosure of the report and results of a polygraph examiner's examination. V.T.C.S. art. 4413(29cc). However, we note that article 4413(29cc) provides that the examinee of a polygraph examination has a special right of access to the results of his or her polygraph examination. V.T.C.S. art. 4413(29cc), § 19A(c)(1). In this instance, there is no representation that the submitted records contain the polygraph test results of the requestor's client. The district attorney's office is barred from releasing the *results* of the polygraph examinations to anyone except as specifically provided by section 19A of article 4413(29cc), V.T.C.S. *See also* Open Records Decision No. 430 (1985). We conclude, therefore, that the requestor is not entitled to a copy of polygraph examiner's report concerning the alleged suspect by virtue of section 19A of article 4413(29cc) of the Code of Criminal Procedure.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping "S" at the beginning.

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/nc

Ref.: ID# 125442

Encl.: Submitted documents

cc: Ms. Sherry Scott Chandler  
O'Quinn & Laminack  
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(w/o enclosures)